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# FILED

DISTRICT COURT OF GUAM

NOV 14 2005 *JP*

MARY L.M. MORAN  
CLERK OF COURT

Attorneys for Petitioners

**DISTRICT COURT OF GUAM  
TERRITORY OF GUAM**

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

vs.

FELIX A. CAMACHO, etc., *et al.*,

Respondents.

CIVIL CASE NO. 04-00006

**COUNSEL FOR PETITIONER'S  
MOTION FOR ATTORNEYS' FEES  
AND COSTS**

Interim Class Counsel Michael F. Phillips, counsel for the Petitioner, individually and on behalf of the all those similarly situated, submits this Motion for Attorneys' Fees and Costs pursuant to Rules 23(h) and 54(d)(2). This motion is supported by the Points and Authorities below, the Declaration of Interim Class Counsel Michael F. Phillips, filed concurrently herewith, Petitioner's Motion for Appointment of Class Counsel, filed concurrently herewith, the record in this case, and any further evidence and arguments presented at a hearing, if any, on this matter.

# ORIGINAL

**MEMORANDUM OF POINTS AND AUTHORITIES**

The Background of this matter is contained and thoroughly discussed in Petitioner's Motion for Appointment of Class Counsel ("Pet.'s Mot. Appt. Class Counsel"), filed concurrently herewith, and which Interim Class Counsel respectfully incorporates by this reference.

**I. ARGUMENT**

**A. Pursuant to FRCP Rules 23(h) and 54(d)(2), Interim Class Counsel Requests Attorneys' Fees and Costs in the Amount of Ten Percent (10%) of the Total Settlement Amount Recovered on Behalf of the EIC Class.**

Interim Class Counsel initiated this matter on behalf of Petitioner and the EIC Class on February, 2004, seeking the implementation of the EIC program for Guam taxpayers and the ultimate payment of EIC refunds to eligible taxpayers. The Petition sought payment of amounts in excess of \$112 million for the EIC Class. Interim Class Counsel recently entered into a Settlement Agreement on behalf of the EIC Class for the Settlement Amount of \$90 million and the implementation of the EIC program for tax year 2005 and beyond, estimated to provide an additional benefit of approximately \$15 to \$20 million per tax year. Pursuant to the Settlement Agreement, attorneys' fees or costs are to be determined by the Court following a motion under FRCP Rule 23(h). See Settlement Agreement § II(a)(iii). For all the reasons set out below, subject to the opportunity of EIC class members to object as allowed by FRCP Rule 23(h)(2), Interim Class Counsel requests ten percent (10%) of the total settlement amount recovered on behalf and for the benefit of the EIC Class, pursuant to FRCP Rules 23(h) and 54(d)(2).

1 On September 19, 2005, the Magistrate Judge, recognizing the parties' desire to  
2 proceed with the June 20, 2005 Settlement Agreement, and subject to renewal by the  
3 moving parties, denied pending motions related to the earlier June 14, 2004 settlement  
4 agreement, including Petitioner's Motion for an order Preliminarily Approving the  
5 Granting of Attorneys' Fees and Costs.  
6

7 In support of this motion, FRCP Rule 23(h) allows the court to award reasonable  
8 attorney fees and nontaxable costs pursuant to a motion under Rule 54(d)(2) for an  
9 award of attorney fees. According to the Advisory Committee Notes, Rule 23(h) applies  
10 to "cases in which there is a simultaneous proposal for class certification and settlement  
11 even though technically the class may not be certified unless the court approves the  
12 settlement pursuant to a review under Rule 23(e)".  
13

14 Thus, "[w]hen a settlement is proposed for Rule 23(e) approval . . . with a request  
15 for certification, notice to class members about class counsel's fee motion would  
16 ordinarily accompany the notice to the class about the settlement proposal itself." *Id.*  
17 (emphasis added). The Advisory Committee Notes also state this Court should direct  
18 when the fee motion must be filed, and for "motions by class counsel in cases subject to  
19 court review of a proposed settlement under Rule 23(e), it would be important to require  
20 the filing of at least the initial motion in time for inclusion of information about the motion  
21 in the notice to the class about the proposed settlement that is required by Rule 23(e)."  
22 *Id.* (emphasis added). In addition, Rule 23(h)(2) requires that class members have the  
23 opportunity to object to the motion. Rule 23(h)(3) allows, but does not require this Court  
24 to hold a hearing on the motion.  
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1 In June, 2005, Petitioners and Respondents presented this Court with a  
2 proposed Settlement Agreement to be reviewed and approved under the standards of  
3 Rule 23(e) together with a request for conditional class certification. As such, consistent  
4 with Rule 23(h) and the guidance of the Advisory Committee Notes thereto, Interim  
5 Class Counsel requests this Court allow the filing of this motion for attorneys' fees and  
6 costs for purposes of inclusion of information on the motion in the notice to the class  
7 about the proposed settlement as required by Rule 23(e).  
8

9 Interim Class Counsel acknowledges and recognizes that pursuant to Rule  
10 23(h)(2), the motion would not be acted upon until class members have the opportunity  
11 to object to the motion. In addition, Interim Class Counsel acknowledges and  
12 recognizes the provision of the proposed Settlement Agreement requesting this Court  
13 hear the merits of this motion in conjunction with a fairness hearing on the proposed  
14 Settlement Agreement. See Settlement Agreement, Section II (c).  
15

16 The United States Supreme Court has historically and consistently recognized  
17 that "a litigant or a lawyer who recovers a common fund for the benefit of persons other  
18 than himself or his client is entitled to a reasonable attorney's fee from the fund as a  
19 whole." See Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citing Trustees v.  
20 Greenough, 105 U.S. 527 (1882); Central Railroad & Banking Co. v. Pettus, 113 U.S.  
21 116 (1885); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); and Sprague v. Ticonic  
22 National Bank, 307 U.S. 161 (1939). The Supreme Court found the common-fund  
23 doctrine rests on the perception that persons who obtain the benefit of a lawsuit without  
24 contributing to its cost are unjustly enriched at the successful litigant's expense. Id.  
25 (citations omitted). Thus, the doctrine allows a court to prevent this inequity by  
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1 assessing attorney's fees against the entire fund, thus spreading fees proportionately  
2 among those benefited by the suit. Id. The Supreme Court further explained:

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4 In Alyeska Pipeline Service Co. v. Wilderness Society,  
5 supra, we noted the features that distinguished our common-  
6 fund cases from cases where the shifting of fees was  
7 inappropriate. First, the classes of persons benefited by the  
8 lawsuits "were small in number and easily identifiable." 421  
9 U.S., at 265, n. 39. Second, "[the] benefits could be traced  
10 with some accuracy. . . ." *Ibid.* Finally, "there was reason for  
11 confidence that the costs [of litigation] could indeed be  
12 shifted with some exactitude to those benefiting." *Ibid.* Those  
13 characteristics are not present where litigants simply  
14 vindicate a general social grievance. *Id.*, at 263-267, and n.  
15 39. On the other hand, the criteria are satisfied when each  
16 member of a certified class has an undisputed and  
17 mathematically ascertainable claim to part of a lump-sum  
18 judgment recovered on his behalf. Once the class  
19 representatives have established the defendant's liability and  
20 the total amount of damages, members of the class can  
21 obtain their share of the recovery simply by proving their  
22 individual claims against the judgment fund. This benefit  
23 devolves with certainty upon the identifiable persons whom  
24 the court has certified as members of the class. Although the  
25 full value of the benefit to each absentee member cannot be  
26 determined until he presents his claim, a fee awarded  
27 against the entire judgment fund will shift the costs of  
28 litigation to each absentee in the exact proportion that the  
value of his claim bears to the total recovery. See generally  
Dawson, Lawyers and Involuntary Clients in Public Interest  
Litigation, 88 Harv. L. Rev. 849, 916-922 (1975).

20 Id. at 478-479. See also Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003) ("[T]he  
21 common fund doctrine ensures that each member of the winning party contributes  
22 proportionately to the payment of attorneys' fees."); Fischel v. Equitable Life Assurance  
23 Soc'y, 307 F.3d 997, 1006 (9th Cir. 2002) ("When counsel recover a common fund  
24 which confers a 'substantial benefit' upon a class of beneficiaries, they are entitled to  
25 recover their attorney's fees from the fund.") (Citing Lewis v. Anderson, 692 F.2d 1267,  
26 1270 (9th Cir. 1982); In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza

Hotel Fire Litig., 56 F.3d 295, 305 n.6 ("The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs."); and Paul, Johnson, Alston & Hunt v. Gaulty, 886 F.2d 268 (9th Cir. 1989), where the Ninth Circuit Court explained:

Although the common fund doctrine does not permit the shifting of the burden of the litigation expenses to the losing party, it does permit the burden to be shared among those who are benefited by the litigant's efforts. See Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir.), cert. denied, 488 U.S. 822, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); Vincent v. Hughes Air West, Inc., 557 F.2d 759, 770 (9th Cir. 1977). . . . The common fund doctrine is properly applied, however, only if "(1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted with some exactitude to those benefiting." Hill, 775 F.2d at 1041 (9th Cir. 1985).

"Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method." Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002) (Citing In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295-96 (9th Cir. 1994)). See also Gaulty, 886 F.2d at 272 ("We leave to the district court the task of determining what would be reasonable compensation for creating this common fund . . . We believe that either method may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund.").

The Ninth Circuit recognized that 25% is the proper benchmark percentage in common fund cases:

The sole remaining issue is what percentage of the common fund would provide PJAH reasonable compensation. The answer to that question, of course, depends on the individual circumstances of this case with which the district court is more familiar than we are. Ordinarily, however, such fee

1 awards range from 20 percent to 30 percent of the fund  
2 created. We note with approval that one court has concluded  
3 that the "bench mark" percentage for the fee award should  
4 be 25 percent. That percentage amount can then be  
5 adjusted upward or downward to account for any unusual  
6 circumstances involved in this case.

7 Id. See also In re Pac. Enters. Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995):

8 [T]wenty-five percent is the 'benchmark' that district courts  
9 should award in common fund cases.

10 In Vizcaino, the Ninth Circuit recognized some of the relevant factors and  
11 circumstances the district court may consider in determining a reasonable fee, including  
12 the fund size, exceptional results achieved by counsel for the class, the complexity of  
13 the issues and risks of the case, incidental or nonmonetary benefits conferred by the  
14 litigation, and the contingency basis of the litigation and the burdens on counsel. 290  
15 F.3d 1047-1050.

16 In this class action, Interim Class Counsel, on behalf of Petitioner and the EIC  
17 Class, sought the implementation and payment of EIC for eligible Guam taxpayers  
18 amidst complete silence among all other attorneys and law firms. As thoroughly  
19 discussed in the Argument portion of Petitioner's Motion for Appointment of Class  
20 Counsel, filed concurrently herewith, and which portion is respectfully incorporated by  
21 this reference, Interim Class Counsel extensively researched and initiated this class  
22 action, defended the interests of the EIC Class against two applicants for intervention,  
23 negotiated a complex settlement agreement and defended its legality amid internal  
24 conflicts among the Respondents, and negotiated and executed a second proposed  
25 Settlement Agreement with Respondent Governor and Respondent Directors.



1 Counsel for Petitioners obtained a favorable settlement in the amount of \$90  
2 million for the EIC Class. The recovery of the settlement amount occurred after more  
3 than a decade of the Government of Guam's complete denial of the applicability of the  
4 EIC program to Guam taxpayers, the refusal to pay EIC, and the government's refusal  
5 to allow taxpayers to apply for EIC on Guam income tax returns, even in the face of a  
6 Supreme Court of Guam decision and local legislation demanding the implementation  
7 and payment of the EIC. Thus, despite this Class Action being filed in 2004, Petitioner  
8 and the EIC Class have waited almost an entire decade for their right to the  
9 implementation of the EIC program and payment of EIC refunds.  
10

11 The proposed Settlement Agreement provides for the payment of the settlement  
12 amount by devoting at least 15% of any amount placed into the Government of Guam's  
13 tax refund reserve funds, which are the funds used to pay general tax refunds, including  
14 the assurance of an immediate reservation of at least \$15 million. See Settlement  
15 Agreement §§ V(a) and VIII. In addition, the Settlement Agreement provides for full  
16 implementation of the EIC beginning with tax year 2005, estimated to benefit the EIC  
17 Class and other tax payers in the amount of \$15 to \$20 million per tax year. See  
18 Settlement Agreement Section IV(d).  
19

20 The criteria to apply the common fund doctrine is easily met where, as here,  
21 each member of the EIC Class has an undisputed and mathematically ascertainable  
22 claim to part of a lump-sum settlement recovered on his behalf. See Van Gemert, 444  
23 U.S. at 497. Under the Settlement Agreement, members of the EIC Class meeting the  
24 relevant qualifications for EIC for any or all of tax years 1995, 1996, 1999 and 2000, will  
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1 proportionately share \$15 million of the settlement amount based on their total filed  
2 claims for EIC for all of those tax years. See Settlement Agreement, § IV(a)(i).

3  
4 Members of the EIC Class who filed claims for EIC for tax year 1998 and  
5 otherwise met the relevant qualifications will also proportionately share \$15 million of  
6 the settlement amount based on their total filed claims for EIC for tax year 1998. See  
7 Settlement Agreement, § IV(a)(ii). Members of the EIC Class meeting the relevant  
8 qualifications for EIC for tax year 2001 will proportionately share \$15 million plus any  
9 funds allocated and unclaimed for tax year 1998, based on their total filed claims for EIC  
10 for tax year 2001. See Settlement Agreement, § IV(a)(ii-iii). Finally, members of the  
11 EIC Class meeting the relevant qualifications for EIC for each of tax years 2002, 2003  
12 and 2004 will proportionately share \$15 million plus any funds allocated and unclaimed  
13 for the immediate prior tax year, based on their total filed claims for EIC for each  
14 applicable tax year. See Settlement Agreement, § IV(a)(iii-vi).

15  
16 Based on the settlement amounts allocated for each respective tax year and the  
17 total qualified claims filed by each EIC Class member, it is unmistakable that under the  
18 Settlement Agreement, each member of the EIC Class has an undisputed and  
19 mathematically ascertainable claim to part of the settlement amount recovered for the  
20 EIC Class.

21  
22 As provided above, this Court has the discretion in common fund cases to  
23 choose either the percentage-of-the-fund or the lodestar method. See Vizcaino, 290  
24 F.3d at 1047. Like the Ninth Circuit, other Circuits and courts have recognized the  
25 advantages of the percentage-of-the-fund method in common fund cases. See Court  
26 Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 254-59  
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1 (1985) (where task force commissioned by the Third Circuit recommended that  
2 compensation for creating common funds be calculated by a percentage of the funds  
3 created); Blum v. Stenson, 465 U.S. 886, 900 n. 16 (1984) (noting that the percentage  
4 basis method is grounded in tradition and therefore an acceptable way of calculating the  
5 fee award); Bussie v. Allmerica Fin. Corp., 1999 U.S. Dist. LEXIS 7793, 1999 WL  
6 342042 at 2 (D. Mass. 1999) (unreported opinion) ("From a public policy standpoint, the  
7 [percentage of fund] method of calculating fees more appropriately aligns the interests  
8 of the class with the interests of class counsel - the larger the value of the settlement,  
9 the larger the value of the fee award. Furthermore, the [percentage of fund] method  
10 encourages efficiency and avoids the disincentive to settle cases early created by the  
11 lodestar method."); and In re Thirteen Appeals, 56 F.3d at 307 (approving the  
12 percentage of fund approach as an acceptable method and recognizing "that use of the  
13 [percentage of fund] method in common fund cases is the prevailing praxis [with] . . .  
14 distinct advantages"). The Third Circuit explained:

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17 In complex litigation -- and common fund cases, by and  
18 large, tend to be complex -- the POF approach is often less  
19 burdensome to administer than the lodestar method. See  
20 Swedish Hosp., 1 F.3d at 1269 (finding POF approach "less  
21 demanding of scarce judicial resources"). Rather than  
22 forcing the judge to review the time records of a multitude of  
23 attorneys in order to determine the necessity and  
24 reasonableness of every hour expended, the POF method  
25 permits the judge to focus on "a showing that the fund  
26 conferring a benefit on the class resulted from" the lawyers'  
27 efforts. . . .

28  
For another thing, using the POF method in a common fund  
case enhances efficiency, or, put in the reverse, using the  
lodestar method in such a case encourages inefficiency.  
Under the latter approach, attorneys not only have a  
monetary incentive to spend as many hours as possible (and  
bill for them) but also face a strong disincentive to early

1 settlement. See Third Circuit Report, 108 F.R.D. at 247-48  
 2 (finding that, in common fund cases, the lodestar method  
 3 "encourages lawyers to expend excessive hours" and  
 4 "creates a disincentive for the early settlement of cases");  
 5 see also FJC Report, supra, at 310. If the POF method is  
 6 utilized, a lawyer is still free to be inefficient or to drag her  
 7 feet in pursuing settlement options -- but, rather than being  
 8 rewarded for this unproductive behavior, she will likely  
 9 reduce her own return on hours expended.

10 Another point is worth making: because the POF technique  
 11 is result-oriented rather than process-oriented, it better  
 12 approximates the workings of the marketplace. We think that  
 13 Judge Posner captured the essence of this point when he  
 14 wrote that "the market in fact pays not for the individual  
 15 hours but for the ensemble of services rendered in a case of  
 16 this character." In re Continental Ill. Sec. Litig., 962 F.2d 566,  
 17 572 (7th Cir. 1992). In fine, the market pays for the result  
 18 achieved.

19 Id.

20 Interim Class Counsel and his law firm are one of the few, if not the only, law firm  
 21 on Guam that has consistently litigated to enforce public policies on Guam, whether  
 22 popular or unpopular. The EIC program is a public policy that went unenforced by the  
 23 government for a decade accompanied by wide-spread media attention as each  
 24 successive tax year passed. Yet, on this small island territory, no other plaintiff  
 25 counsels were willing to represent EIC claimants even after this high profile action was  
 26 announced seeking more than \$112 million in damages. Only upon settlement and  
 27 media attention focused on the recovery for the EIC Class and the potential recovery of  
 28 attorneys' fees did other law firms seek to enter this matter or file separate lawsuits  
 seeking to take part in the recovery for the EIC Class.

There are many reasons Guam attorneys hesitate to initiate challenges against  
 this government regarding the enforcement of public policies on Guam. As this case

1 demonstrates, plaintiff attorneys are bound to face political and public scrutiny when  
2 seeking to change long-entrenched government behavior. Regardless of each firm's  
3 reasons, the lack of participation and unwillingness to litigate on behalf of contingent  
4 public policy or public interest causes is unmistakable. With the exception of counsel  
5 for Petitioners, Guam attorneys have no history filing large complex class action  
6 lawsuits against the government of Guam. The contingent nature of large complex  
7 class action lawsuits may not lend favorably to participation by what are primarily small  
8 or individually run law firms with concentrated practices outside of class actions, and  
9 with scarce resources committed to more necessary bottom line objectives.

11 It is safe to conclude that there is no active legal environment on Guam for a  
12 thriving contingent class action practice where attorneys may reasonably expect to  
13 recoup resources dedicated to losing causes from victorious cases. Rather, it is entirely  
14 reasonable to conclude that for most law firms on Guam, if not all, deciding whether to  
15 dedicate resources to one complex class action lawsuit could mean risking the ability to  
16 focus on and generate fees related to the firm's standard practice and at worst, the  
17 ability to meet the basic expenses necessary to continue the firm's existence. Most law  
18 firms instead choose to represent government agencies and departments.

20 It is this environment Interim Class Counsel submits necessitates the  
21 encouragement of Guam attorneys to take on causes that benefit large portions of  
22 Guam's people. If the recovery of fees from contingent class action cases is not worth  
23 the risks involved with the commitment of resources essentially dedicated from the  
24 outset of the suit, the participation of the Bar in furthering the enforcement of laws for  
25 the benefit of citizens would be even more non-existent. See In re Thirteen Appeals, 56  
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1 F.3d at 307 (recognizing that although the percentage of the fund method may  
2 sometimes result in the overpayment of attorneys, "law firms may be less willing to  
3 commit needed resources to common fund cases, even those for the public benefit, if  
4 the likely recovery is relatively small."). The percentage of the fund method does not  
5 always allow for higher recoveries, but the method clearly encourages law firms,  
6 especially in smaller legal environments such as this territory's, to take on causes that  
7 otherwise may go unchallenged. Interim Class Counsel respectfully requests the  
8 discretion of this Court in light of the entire circumstances of this case and the legal  
9 environment upon which it was filed, to choose the percentage of the fund method to  
10 determine the attorneys fees award in this matter.  
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12  
13 In the Petition and proposed Amended Petition filed with this Court, Interim Class  
14 Counsel requested 10% of the recovery for the benefit of the class even with complete  
15 knowledge of the benchmark in the Ninth Circuit being 25%. Interim Class Counsel  
16 submits the factors recognized by the Ninth Circuit do not support a lowering of the fee  
17 to less than the percentage requested.

18 Members of the EIC Class have been denied for almost a decade not only the  
19 payment of earned income tax credit refunds, but in some cases the ability to even  
20 apply for such credits. Estimates of unpaid EIC have varied from between \$10 to \$15  
21 million per tax year, with exact figures difficult to calculate in part due to the  
22 government's refusal to accept EIC applications in some cases. Tax year after tax year,  
23 with no legal challenges, the potential liability of the government increased substantially  
24 as a result of its legal position denying the applicability of the EIC program. The \$90  
25 million benefit to the EIC Class proposed by the Settlement Agreement is substantial.  
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1 Fund size was established as a relevant consideration in In re Wash. Pub. Power  
2 Supply Sys. Sec. Litig., 19 F.3d 1291 (9th Cir. 1994) ("WPPSS"), and explained in  
3 Vizcaino, 290 F.3d at 1047-1048.

4  
5 In WPPSS, the Ninth Circuit agreed with the district court that in a case involving  
6 a \$687 million settlement fund, "picking a percentage without reference to all the  
7 circumstances of the case, including the size of the fund, would be like picking a  
8 number out of the air." Id. at 1297. While the fund in this case is substantial, Interim  
9 Class Counsel submits the fund size is not of the magnitude referenced by the WPPSS  
10 which would necessitate an automatic reduction from the Ninth Circuit's benchmark, nor  
11 of the magnitude which would necessitate a reduction from Interim Class Counsel's  
12 request of 10%. On the contrary, the circumstances of this class action demonstrates  
13 that a 10% recovery under the percentage of the fund method is entirely reasonable.

14  
15 The results achieved by counsel for Petitioners, as evidenced by the terms of the  
16 proposed Settlement Agreement, is also a relevant circumstance. The results achieved  
17 by the proposed Settlement Agreement generally speaks for itself. EIC Class members  
18 waited up to a decade in some cases for the ability to claim EIC on their tax returns, and  
19 most important, the ability to receive refundable earned income tax credits. EIC is  
20 intended to alleviate the financial difficulties faced by hard working individuals and  
21 families in the lowest income brackets. EIC payments are not tax refund windfalls that  
22 allow its recipients to enjoy luxuries otherwise unavailable. EIC payments are tax  
23 refunds that allow working recipients to make ends meet. By forcing the government to  
24 change its entrenched public policy denying EIC's applicability to Guam taxpayers, the  
25 terms of the proposed Settlement Agreement requires the government to implement the  
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1 EIC program beginning with tax year 2005 and beyond, to allow eligible Guam  
2 taxpayers to claim the EIC on their tax returns, and to pay such refundable earned  
3 income tax refunds as required by the Organic Act and the Guam Territorial Income Tax  
4 law. In addition, the terms of the proposed Settlement Agreement recognizes both the  
5 limitations of the government's ability to pay past EIC in light of its financial condition,  
6 and the obligations of the government for denying EIC's applicability for almost a  
7 decade. The terms of the proposed Settlement Agreement identifies a total settlement  
8 amount of \$90 million for all EIC payments due for years the government has either  
9 refused applications for EIC, or refused payment for filed EIC claims. These tax years  
10 include 1995, 1996, 1998 and 1999-2004.  
11

12  
13 If the proposed Settlement Agreement is finally approved by this Court, EIC  
14 Class members will benefit not only in the form of being compensated for the  
15 government's refusal to recognize federal and local law demanding implementation of  
16 the EIC program, but also from the injunctive nature of the terms of the Settlement  
17 Agreement requiring future implementation of the EIC program. No longer will Guam  
18 taxpayers fill out Guam income tax returns with the EIC portion "blackened out" or  
19 otherwise made inapplicable. The exceptional results achieved by this class action and  
20 the work of Interim Class Counsel is evident in the benefits that all EIC class members  
21 will receive in the form of compensation and in their ability to file for EIC in the future.  
22 The relevancy of results achieved by this class action supports a recovery of attorneys'  
23 fees in the area of the Ninth Circuit's benchmark of 25%. Interim Class Counsel's  
24 request of 10% is reasonable under these circumstances.  
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1 Even disregarding the internal conflicts and challenges among Respondents  
2 Governor and Attorney General, this class action from the outset included inherent risks  
3 due in part to the complexity of issues involved. The record in this case from its  
4 initiation to settlement more than substantiates the inherent and diverse issues in this  
5 action. The defenses set forth by the government throughout its denial of EIC, whether  
6 in public or before the courts, includes issues related to federal mandates, the alleged  
7 necessity of federal or local government appropriations, the alleged characteristic of EIC  
8 as government subsidies, the authority over expenditures by the local government,  
9 statute of limitation concerns, including jurisdictional requirements, Congressional intent  
10 of EIC as it applies to Guam, including such allegations as it relates to Congress'  
11 passage of the Organic Act of Guam, the alleged supremacy of local tax commissioner  
12 revenue rulings, allegations regarding the limited authority of this Court over tax  
13 remedies, and of course, the intricacies of complex income tax procedures and  
14 regulations regarding the implementation of the EIC program. The complexity of issues  
15 evolved to now also include the scope of authority of Guam's first elected Attorney  
16 General, an issue now raised in every court on Guam and the Ninth Circuit.

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18  
19 In addition, this class action involves a large amount of Guam taxpayers,  
20 estimated to be more than 10,000 individuals, and involves nine separate tax years. To  
21 properly address claims, the class action required by necessity an analysis of past and  
22 current provisions of the Internal Revenue Code (Guam's GTIT mirrors such provisions)  
23 to determine relevant procedures and qualifications for both the application and receipt  
24 of EIC. The government's behavior requiring this action required Interim Class  
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1 Counsel's research of tax return documents, public statements, and other factual  
2 documentation over almost a decade relevant to the claims of the EIC Class.

3  
4 Although Interim Class Counsel submits his confidence in success on the merits  
5 never waived, such confidence was tempered by the inherent complexity and diversity  
6 of issues involved in this action. As evident from the above, the success of the class  
7 action depended on the success not of a few manageable issues, but on the legal  
8 success of a variety of jurisdictional and statutory and constitutional issues raised by the  
9 government. The risks of success in applying an entire federally mandated program to  
10 Guam taxpayers, in the face of almost a decade of local government denial, was  
11 apparent from the outset, and supports Interim Class Counsel's request of a recovery of  
12 attorneys fees well below the Ninth Circuit's benchmark of 25%.

13  
14 The incidental benefits is also a relevant circumstance to consider. Under the  
15 terms of the proposed Settlement Agreement, monetary compensation for past EIC  
16 claims is evidently the highlight of the benefits conferred upon EIC Class members.  
17 However, even though monetary benefits is also the ultimate objective of the entire  
18 implementation of the EIC program, the incidental benefits of mandating the  
19 implementation of the EIC program for 2005 and beyond and the monetary benefits  
20 outside of the established \$90 million fund is significant and substantial. Unlike  
21 previous tax years, EIC Class members and other new Guam taxpayers will have their  
22 rights restored to apply for EIC on their income tax returns. The implementation of the  
23 entire EIC program, including the application and consideration process, as well as the  
24 receipt of eligible refunds, is the cornerstone of this class action. The incidental benefits  
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1 conferred by the terms of the proposed Settlement Agreement supports Interim Class  
2 Counsel's request for a recovery of attorneys' fees.

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4 Finally, the contingency basis of this class action and the burden on class  
5 counsel, including the time and resources Interim Class Counsel has devoted and will  
6 continue to devote, is also a relevant consideration. As previously mentioned, a class  
7 action suit against this government by its nature involves significant burdens to initiating  
8 counsel. As this class action has evolved, the internal conflicts of Respondents has  
9 only added to the burdens faced by Petitioners and Interim Class Counsel. Interim  
10 Class Counsel remains confident in the legality of the original settlement agreement  
11 entered into by the Acting Governor of Guam, the Respondent Directors, and the  
12 Attorney General. Interim Class Counsel endured not only public scrutiny of backdoor  
13 intervening counsels, but harsh public statements of impropriety from the Governor  
14 when he decided to enter an appearance and challenge the original settlement  
15 agreement. Nevertheless, in the interest of the EIC Class, Interim Class Counsel  
16 submitted to mediation with all Respondents, and concluded negotiations with a  
17 settlement agreement providing additional benefits to the EIC Class. As a result of  
18 keeping the EIC Class' interest primary, Interim Class Counsel now bears the public  
19 scrutiny of the Attorney General, who opposes the new settlement agreement on  
20 questionable grounds. Indeed, the Attorney General publicly challenged Interim Class  
21 Counsel's motivation in seeking redress on behalf of the EIC Class, suggesting he  
22 would support the new proposed settlement if Interim Class Counsel waived all  
23 attorneys' fees.  
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Aside from facing the political nuances of challenging the elected power structure of the government of Guam, Interim Class Counsel submits the record in the case evidences that settlement has not removed the burdens Interim Counsel may have faced if the case proceeded through normal channels of litigation. This class action was initiated in February, 2004 and settled in June, 2004. In August, 2004, Interim Class Counsel thwarted intervening counsels armed with meritless arguments and groundless public accusations of collusion. In late 2004, the entrance of Respondent Governor and Respondent Directors required the devotion of resources to defend not only the legality of the original settlement, but in part the merits of the class action.

Interim Class Counsel participated extensively over the course of three months to negotiate an additional settlement agreement to resolve disputes raised by Respondent Governor and Respondent Directors. Interim Class Counsel devoted and committed significant resources necessary to obtain the most favorable benefits for the EIC Class, and Interim Class Counsel will be required and is willing to continue to devote such resources as this case proceeds. Interim Class Counsel's commitment of scarce resources on a contingency basis, further supports his request for a recovery of attorneys' fees.

Interim Class Counsel submits a consideration of the entire circumstances of this case is consistent with a finding that Interim Class Counsel's request for attorneys' fees of 10% of the amount recovered for the EIC Class is reasonable under the relevant standards mandated by federal law. As this class action requires additional procedures and continued work, Interim Class Counsel respectfully requests the opportunity, if necessary, to supplement this Memorandum as such conditions require.

## II. CONCLUSION

For all of the above reasons, Interim Class Counsel requests that this Court allow the filing of this motion for attorneys' fees and costs pursuant FRCP Rules 52(d)(2) and 23(h) for purposes of inclusion of information regarding the motion in the notice to the class required by FRCP Rule 23(e). Interim Class Counsel, pursuant to Federal Rules of Civil Procedure 54(d)(2) and Rule 23(h), respectfully requests attorneys' fees and costs in the amount of ten percent (10%) of the amount recovered for the common benefit of the EIC Class, subject to an opportunity provided class members to object to this motion. Interim Class Counsel respectfully requests this Court's discretion under the guidance of the Ninth Circuit, to apply the percentage-of-the-fund method in calculating the fee award in this class action.

With the acknowledgement that class members may file objections to this motion and that continued work is necessary as this class action proceeds, Interim Class Counsel also respectfully request an additional opportunity, consistent with requests by the parties under the provisions of the proposed Settlement Agreement (see Settlement Agreement Section II (c)), to respond and/or supplement this motion as such class objections, if any, require, and as this Court may otherwise order.

Respectfully submitted this 10<sup>th</sup> day of November, 2005.

**PHILLIPS & BORDALLO, P.C.**  
Attorneys for Petitioners

By: \_\_\_\_\_

Michael F. Phillips